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IN THE

Supreme Court of the United States

October Term, 1961

No. 948

Paul Kerr, as taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner,

vs.

The City of Los Angeles, a municipal corporation, Los Angeles Harbor Oil Development Company, [illegible],

Defendants and Respondents.

Letter of Respondent Los Angeles Harbor Oil Development Co. in Opposition to Petition for Writ of Certiorari

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 848

PHILL SILVER, as a taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES HARBOR OIL DEVELOPMENT COMPANY, *et al.*,

Defendants and Respondents.

Answer of Respondent Los Angeles Harbor Oil Development Co. to Petition for Writ of Certiorari.

This is a representative taxpayer's suit brought by petitioner in the California state courts to set aside an oil and gas lease granted by respondent City of Los Angeles to respondent Los Angeles Harbor Oil Development Company. In a decision filed on November 30, 1961, the California Supreme Court held that petitioner could not maintain the action unless there was fraud, collusion, *ultra vires*, or failure of the City to perform a specific duty in the granting of the lease. Finding that none of these elements had

been established, the Supreme Court reversed a lower court judgment which had invalidated the lease. Petitioner now seeks certiorari to review the judgment of the California Supreme Court.

The Petition for Writ of Certiorari should be denied forthwith. It is sham and frivolous. It states no grounds for certiorari. The judgment of the California Supreme Court is based solely upon state law. As no federal questions are presented, the United States Supreme Court has no jurisdiction to review the proceedings (28 U. S. C. A. 1257). Respondent requests a prompt denial of the petition, as its pendency is delaying the drilling of wells under the lease.

1. Summary of Proceedings in the California Trial Court.

For many years prior to 1956, the City of Los Angeles had been attempting to interest oil companies in leasing submerged lands located in the Los Angeles Harbor. The City had acquired title to the lands in 1911 under a tideland grant from the State of California (Statutes of 1911, Page 1256). In 1953, the federal government had quitclaimed its interest in the lands by virtue of Section 3 of the Submerged Lands Act (43 U. S. C. A. 1311).

No person or firm had ever made an offer to lease the lands until respondent Los Angeles Harbor Oil Development Company made an offer in August 1956. The proposal was widely publicized in magazines and newspapers throughout the area. The offer was accepted in December 1956 and an oil and gas lease was granted to the Development Company.

After the lease was awarded, petitioner, as a taxpayer of the City of Los Angeles, filed this action to set aside the lease. Named as defendants were the City of Los Angeles and the Development Company. An attempt by petitioner to bring the Attorney General of California into the case was refused. The five causes of action in the amended complaint alleged a variety of theories to invalidate the lease:

First Cause of Action.

The City abused its discretion in approving a council committee report which recommended that the lease be awarded to the Development Company, without giving other oil companies an opportunity to submit proposals.

Second Cause of Action.

The Mayor violated Section 40 of the Los Angeles City Charter in failing to exercise "constant supervision" over the granting of the lease.

Third Cause of Action.

In restricting lease proposals to the Development Company, the Los Angeles City Council "contravened" the California Constitution and the equal protection clause of the Fourteenth Amendment.

Fourth Cause of Action.

The City breached its trust and failed to exercise ordinary care by not giving other oil companies an opportunity to submit lease proposals.

Fifth Cause of Action.

In awarding the lease to the Development Company, the City violated the Public Resources Code of the State of California.

After a lengthy trial, the trial court concluded that the lease was invalid for two reasons: (a) the City had failed to exercise *due care* in awarding the lease, and (b) the City had *improperly delegated* consideration of the lease to a *committee* of the City Council [Clk. Tr. pp. 321, 605]. A judgment declaring the lease void was entered. As to all other allegations in the amended complaint, the court found against petitioner. It is to be noted that only the third cause of action purported to raise any federal or constitutional question. With respect to this cause of action, the trial court found that the City did not violate any of petitioner's rights under the Fourteenth Amendment (Pet. p. 11).

2. Summary of Proceedings in the California Supreme Court.

After the adverse judgment in favor of petitioner, respondents City of Los Angeles and the Development Company appealed to the California Supreme Court. In a unanimous decision filed on November 30, 1961, the California Supreme Court reversed the judgment which had invalidated the lease (*Silver, v. City of Los Angeles, et al.*, 57 A. C. 13). The decision was based solely upon California law. At the beginning of its opinion, the court stated, in no uncertain terms, the sole question for decision:

> "This is the sole question necessary for us to determine: *May a taxpayer bring a representative action to set aside a contract entered into between a municipality and a private corporation relative to lands held by the municipality in trust, in the absence of fraud, collusion, ultra vires, or a failure*

on the part of the municipality to perform a duty specifically enjoined." (Opinion of California Supreme Court: Petition for Writ, Appendix A, p. 2).

The court held that a taxpayer in California can maintain a representative action to set aside a municipal contract only in the event of fraud, collusion, *ultra vires*, or failure on the part of the City to perform a specifically enjoined duty. Pointing to petitioner's stipulation that there was no actual fraud, corruption, bad faith or undue influence involved in the granting of the lease, the court reversed the judgment:

> "All that was required of defendant municipality was that its agents act fairly in all matters respecting the proper discharge of their duties. . . . Since it was stipulated that there was no actual fraud, corruption, bad faith, or undue influence, there is no basis for contending that they did not act fairly.
>
> "On the contrary, in view of the stipulation it must be found that defendant councilmen applied their honest, considered judgment to the problem at hand. Under such circumstances, they are answerable to the electorate, but not the courts, if they were mistaken or were wanting in business acumen. . . .
>
> * * * * *
>
> "'Applying the above-stated rules of law to the undisputed factual situation in the present case, plaintiff as a taxpayer in his representative capacity cannot maintain the present action." (Petition for Writ, Appendix A, pp. 4, 5).

The court did not mention petitioner's contention that the awarding of the lease "contravened" the equal protection clause of the Fourteenth Amendment.

3. There Are No Federal Rights or Questions Involved in the Proceedings.

In petitioner's own words, the questions presented by the petition are (1) did the City of Los Angeles "violate" the equal protection clause of the Fourteenth Amendment, and (2) whether the decision of the California Supreme Court "would be contrary to" the Fourteenth Amendment (Petition for Writ, p. 12).

It is to be noted that petitioner does not raise a question as to violation of any of *his* federal rights. The reason is that none of petitioner's constitutional rights were involved in the granting of the lease. Petitioner was not a prospective bidder for the lease. He does not claim that he was denied an opportunity to submit a bid. He does not allege that he had any interest in the lands. He does not allege that his taxes were increased as a result of the granting of the lease. The petitioner states no grounds for certiorari, as none of his rights under the Fourteenth Amendment are involved. Petitioner is a mere taxpayer who claims that the City should not have granted a lease to the Development Company.* The allegation of a fictitious

*Petitioner's real contention throughout the litigation has been that the City might have obtained a lease on better terms. But the trial court did not so find. [Clk. Tr. p. 605.] The evidence at the trial disclosed that, before the lease was awarded to the Development Company, the Union Oil Company and General Petroleum Company had expressed an interest in the lands to be leased. But neither company made any kind of an offer to the City. A representative of General Petroleum testified at the trial that his company would *not* have signed the lease granted to the Development Company. Although repeatedly warned by the trial judge to call an officer of the Union Oil Company to explain whether his company would have offered better terms, petitioner failed to do so. His failure resulted in a presumption under California procedural law that the Union Oil Company would not have offered a better lease (California Code of Civil Procedure, Section 1963, Subdivision 5).

constitutional question is insufficient. There must be a real, constitutional right of the petitioner which is asserted (*U. S. Fidelity & Guaranty Company v. Oklahoma*, 63 L. Ed. 870, 250 U. S. 111, 39 S. Ct. 399).

Petitioner cannot assert any rights of the General Petroleum or the Union Oil Companies. In *Liberty Warehouse Co. v. Burley Cooperative Assn.*, 48 S. Ct. 291, 276 U. S. 71, 72 L. Ed. 473, this court held that a petitioner ". . . must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or laws of the United States. . . ."

We do not concede that the General Petroleum and the Union Oil Companies had any constitutional rights which were either involved or violated. Under the local law in effect when the lease was granted, the City was not required to submit the lease to competitive bidding (Petition for Writ, Appendix A, p. 4). In *Davis v. Santa Ana*, 108 Cal. App. 2d 669, 239 P. 2d 650, it was held that "in the absence of some specific charter or statutory requirement, municipal contracts need not be let under competitive bidding". Even if the General Petroleum and Union Oil Companies had asserted any rights, the equal protection clause would not have required the City to have awaited their bids before awarding a lease (*Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497). This court has never intimated that the Fourteenth Amendment requires competitive bidding of municipal contracts. (See: *Seeley v. Haskell*, 14 Wall. 12, 20 L. Ed. 827; *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. Ed. 414; *Central Land Co. v. Laidley*, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; *California State Auto. Assn.*

Bureau v. Maloney, 71 S. Ct. 601, 341 U. S. 105, 95 L. Ed. 788).

Petitioner's real argument appears to be that the California Supreme Court did not follow California law. It is alleged that the California Supreme Court "acted under a mistake of law" in concluding that he did not have the capacity to bring the action (Petition for Writ, p. 13). Petitioner relies entirely upon California state court decisions involving taxpayers' suits which attack a public contract (Petition for Writ, p. 14). But he has erroneously interpreted the California decisions which have consistently held that fraud, *ultra vires*, collusion, or failure to comply with a specific duty are necessary elements of a taxpayer's suit (*West Ins. Co. v. Glenn Irr. Dist.*, 50 Cal. App. 2d 204, 122 P. 2d 595; *Nickerson v. San Bernardino*, 179 Cal. 518, 177 Pac. 465; *Dunn v. Long Beach Land & Water Co.*, 114 Cal. 605, 46 Pac. 607; *Pratt v. Security Trust*, 15 Cal. App. 2d 630, 59 P. 2d 862). Even if petitioner were correct and the California Supreme Court had either misconstrued or had changed the local law applicable to such suits, certiorari is not available (*Commercial Bank of Cincinnati v. Buckingham*, 1847, 5 How. 317, 12 L. Ed. 169; *Congdon, etc. Mining Co. v. Goodman*, 1862, 2 Black 574, 17 L. Ed. 257; *Lessieur v. Price*, 1851, 12 How. 59, 13 L. Ed. 893; *Smith v. Hunter*, 1849, 7 How. 738, 12 L. Ed. 894; *Scott v. Jones*, 1847, 5 How. 343, 12 L. Ed. 181; *Grand Gulf Railroad, etc. Co. v. Marshall*, 1851, 12 How. 165, 13 L. Ed. 938; *Snell v. Chicago*, 1894, 14 S. Ct. 489, 152 U. S. 191, 38 L. Ed. 408; *Ferry v. King County*, 1891, 12 S. Ct. 128, 141 U. S. 668, 35 L. Ed. 895; *Quong Ham Wah Co. v. I. A. C.*, 1921, 255 U. S. 443, 65 L. Ed. 723; *Aero Mayflower Transit Co. v. Bd. of*

R.R. Comm., 1947, 68 S. Ct. 107, 332 U. S. 495, 92 L. Ed. 99).

In *Abbott v. National Bank of Commerce*, 1899, 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217, this court pointed out its lack of jurisdiction to review state court decisions on private civil matters:

> "If it erred in so declaring, it was an error as to a matter of general law and involved no question of a federal nature; still less an error which in any legal sense deprived the plaintiff of his reputation. . . . There was, in our opinion, color for the motion to dismiss, and therefore the motion to affirm may be considered; and as the judgment below did not deprive plaintiff of any right, privilege or immunity secured by the Constitution or laws of the United States, it is affirmed. . . ."

The same answer applies to the argument that the California Supreme Court erroneously interpreted petitioner's stipulation. It is contended that petitioner did not stipulate that there was no fraud in the granting of the lease (Petition for Writ, p. 18). He quotes a portion of the proceedings which occurred during the trial. But petitioner overlooks the stipulation that he made in oral argument on October 17, 1961 before the California Supreme Court:

> "Mr. Silver: . . .
>
> I have not waived fraud entirely. I have submitted my case on the theory, below, that there was a constructive fraud in the method and manner in which this lease was negotiated, to the detriment of other bona fide persons who were seeking likewise to negotiate a lease with the City.

The Chief Justice: You stipulated that there was no actual fraud.

Mr. Silver: *No actual fraud.*

The Chief Justice: Are you saying now that you are basing your contention upon a claim that there was constructive fraud?

Mr. Silver: There was constructive fraud.

Now, your Honors please, we are dealing, first of all—and this should also be considered in its proper setting—with a piece of land that may potentially be worth to the City of Los Angeles many millions of dollars, if not hundreds of millions of dollars. The two reports of the experts which I—

The Chief Justice: That isn't our problem. Let's stay with our difficult problem. Those things are all matters of color, we understand that, but our problem now is to find constructive fraud, or—

Mr. Silver: All right.

The Chief Justice:—the specific duty that is enjoined that has been violated.

Mr. Silver: All right.

Public officials, such as a City Council, have a duty to perform in connection with the administration of the property of the municipality, either in its sale or in the leasing thereof. They can't give it away, they can't act collusively to befriend people, and they can't act corruptly to share in the profits with the beneficiaries of the sale or the lease. Our courts have always had that power to—

The Chief Justice: *You have eliminated those grounds.*

Mr. Silver: *Yes.*

The Chief Justice: I will go over this once again with you.

As I understand it, you are limited now to one of two things: constructive fraud or the violation of a duty specifically enjoined. Let's stay with them.

Mr. Silver: I'm trying.

The Chief Justice: *We are not entirely ignorant of the law with respect to corruption and matters of that sort; but you have eliminated them, so let's not talk about them."* [Reporter's Transcript of Oral Argument in the California Supreme Court, pp. 19-21.] (Emphasis ours.)

As disclosed by these proceedings, petitioner *did* stipulate that there was *no* fraud in the granting of the lease. The extent and scope of the stipulation and its effect upon the action is a local, not a federal, question. In *General Trading Co. v. State Tax Court*, 1944, 64 S. Ct. 1028, 88 L. Ed. 1309, 322 U. S. 335, this court stated that "The application . . . of local laws and the facts on which it founded its judgment are of course controlling". In *Liberty Warehouse Co. v. Burley Cooperative Assn., supra*, 48 S. Ct. 291, 276 U. S. 71, 72 L. Ed. 473, the court stated that "No federal right was impaired by striking No. 3 from the amended answer and counterclaim. Proceedings in state courts must conform to the reasonable requirement of local law. Whether they do is primarily for those courts to determine. . . "

4. Conclusion.

The petition is a sham and frivolous. It offers no color of a federal or constitutional question.

After many years of attempting to interest oil companies, the respondent City of Los Angeles finally secured a lessee willing to drill wildcat wells upon its lands. Instead of serving the interests of taxpayers and residents of the City of Los Angeles, petitioner has done them a real disservice. He has delayed the drilling of wells and the development of the lands for more than five years. Further delay should be avoided. The petition should be promptly denied.

Respectfully submitted,

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